United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

76-1004

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LAWRENCE ALFANO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1004

UNITED STATES OF AMERICA,

Appellee,

-v-

LAWRENCE ALFANO,

Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

Lawrence Alfano appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York on December 5, 1975 after trial before Honorable Orrin G. Judd, United States District Judge, and a Jury, for two substantive violations of Title 18, United States Code, Section 659.

Indictment 74 Cr. 818 was filed in the United

States District Court for the Eastern District of New York on December 26, 1974, and charged the Appellant, in two counts, with the knowing possession of five airline tickets valued in excess of One Hundred ($100.) Dollars which were stolen from a shipment moving in interstate commerce, in violation of Title 18, United States Code, Section 659. On April 15, 1975, Indictment 75 Cr. 298 was filed in the United States District Court, superceding Indictment 74 Cr. 818, and charged the Appellant with the same two crimes.

Trial on Indictment 75 Cr. 298 commenced in the United States District Court for the Eastern District of New York on October 15, 1975, before Honorable Orrin G. Judd, United States District Judge, and a Jury. On October 22, 1975, the Jury returned a verdict of "Guilty" on each of the two counts contained in the indictment. On December 5, 1975, the Appellant was sentenced on the verdict of the Jury to Two (2) Years imprisonment and a fine of One Thousand ($1,000.) Dollars on Count One and Two (2) Years imprisonment on Count Two, the terms of imprisonment to run concurrently each with the other.

Questions Presented

1. Where an accused is charged with the knowing possession of goods stolen from interstate commerce

may proof of the essential elements of the crimes be furnished solely by documents received in evidence without an adequate foundation?

2. Is evidence of subsequent similar criminal acts admissible to establish knowledge of the fact of theft at the time of the earlier possession of the tickets?

The Statement of Facts that follows is set forth in a light most favorable to the Government, as is appropriate, and is predicated virtually entirely upon the documents received in evidence during the trial since no one of the witnesses offered testimony predicated on personal knowledge of any of the facts relevant to the issues raised by the indictment.

Statement of Facts

Rand McNally & Company is engaged in the manufacture of blank ticket stock for airlines and other carriers and has a plant in Nashville, Tennessee for production of those tickets. (A-13 - A-14).*

On April 12, 1973, Greenwald Travel Service, lo-

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* References with prefix "A-" are to the Appendix.
References with prefix "E-" are to the Exhibits.

cated in Clifton, New Jersey, requisitioned blank ticket stock from Rand McNally & Company through the Air Traffic Conference of America. (E-11) On May 11, 1973, Bayonne Travel Service, located in Bayonne, New Jersey, made a similar request for blank ticket stock of Rand McNally & Company. (E-6)

The blank ticket stock requisitioned by Greenwald Travel Service was received by Wings & Wheels Express, Inc., an air freight forwarder, from Rand McNally & Company in Nashville, Tennessee, on April 24th (E-12) and the blank ticket stock requisitioned by Bayonne Travel Service was received by Wings & Wheels Express, Inc. from Rand McNally & Company in Nashville on or about May 25th. (E-7). In each instance, Wings & Wheels Express, Inc. seemingly delivered the shipment to Allegheny Airlines, Inc. as air freight, the initial shipment delivered on April 24, 1973 consigned to Wings & Wheels in Newark, New Jersey, and the later shipment delivered on May 23, 1973 consigned to Wings & Wheels in Newark, New Jersey. (E-14, E-24, E-25; E-8, E-9, E-15).

On June 5, 1973, Wings & Wheels, Inc. reported that the first shipment, or a part of the same, had been "stolen from Wings & Wheels Newark Dock morning of April 26, 1973" and "notified all truckers who were in to [pick up] freight that day also called all travels [sic] agency

that we had [deliver d] to from same shipper [freight] possible had been [delivered] to wrong [consignee]." (E-26)

Two days later, on June 7, 1973, Wings & Wheels, Inc. completed a report indicating that a part of the second shipment had disappeared on May 29, 1973, and that that portion of the shipment "was [picked up] and in the truck morning of May 25, 1973" but the "trucker notified Wings & Wheels office May 29, 1973 stating he could not locate [freight] for [delivery]". (E-10)

On June 24, 1973, two of the numbered tickets contained in the first shipment,--validated on May 5, 1973 by Central Tours, a travel agency in New York City, for round trip passage between New York and Fort Lauderdale, Florida, issued in the names of "Mrs. R. Alfano" and "Mr. R. Alfano",--were presented for passage on Eastern Airlines. (E-1, E-2) Approximately one month later, on July 23, 1973, three of the numbered tickets contained in the second shipment,--validated June 25, 1973 by Grimes Travel Agency, another travel agency in New York City, for round trip passage between New York and Miami, Florida, issued in the names of "Mrs. V. Maltese", "Mr. G. Maltese" and "Mr. S. Maltese",--were presented for passage on National Airlines. (E-3, E-4, E-5).

On August 7, 1973, law enforcement officers, act-

ing pursuant to state court orders, overheard and recorded a telephone conversation between the Appellant and a lady named "June" in which the participants discussed June's intended purchase of airline tickets at a discount from a man named "Mike" through a friend of hers named "Wally". (E-16, et seq.) During that conversation the Appellant advised June to refrain from using "Wally" as the go-between, indicating that he was indebted to "Mike" the same person from whom the Appellant obtained discount airline tickets. June then asked the Appellant whether, if she "get[s] nailed" with the tickets, she would lose the money paid for them, to which the Appellant responded that "if you try for a refund . . . you lose the ticket" (E-21), and, reassuring her, stated that "just flying with them, you got nothing to sweat", indicating that he had "just [come] back myself, I took my whole family, and I would never do that if I didn't think it was sure". (E-21) As well, further reassuring June, the Appellant stated that he "sent Stevie, his family, everybody, and nobody had any problem." (E-21)

On February 24, 1974, the Appellant testified under oath before a Grand Jury sitting in the United States District Court for the Eastern District of New York (A-94 - A-95; A-116 - A-133). During that testimony, the Appellant acknowledged that he and his family had taken an air-

line trip to Florida in July, 1973, travelling to Fort Lauderdale using tickets which the Appellant purchased at a discount from one Michael Argondizzo. (A-117 - A-118, A-121) During his appearance before the Grand Jury the Appellant also acknowledged that he had obtained tickets for "Steve Moltese (phonetic)" and "Danny Kilgallon (phonetic)" through "Mike". (A-123 - A-124)

ARGUMENT

POINT I

VIRTUALLY ALL OF THE EVIDENCE SUSTAINING APPELLANT'S CONVICTION WAS RECEIVED WITHOUT PROPER FOUNDATION

The Government called five witnesses to prove the Appellant's guilt of the two crimes charged in the indictment,--Socrates Georgeades, Assistant Ticket Sales Manager for Rand McNally & Company (A-13); George Zackaroff, Day Supervisor for Wings & Wheels, Inc. (A-29 - A-30); Frank Scinta, an Investigator for the Air Transport Association, an airline trade association (A-37 - A-38); Elizabeth A. Ng Young, a Grand Jury Reporter (A-94); and Howard Brunn, Superintendant of Investigations for Eastern Airlines (A-101).

Not one of the witnesses called by the Government had any personal knowledge of the subject matter of

their testimony.

Thus, for example, Socrates Georgeades, an employee of Rand McNally & Company, identified the five (5) tickets bottoming the two counts in the indictment (A-14, A-24), indicating that they were manufactured in the Rand McNally & Company Plant in Nashville, Tennessee, and identified other documents prepared by the Air Traffic Conference (A-17, A-25) or Wings & Wheels, Inc. (A-18, A-20, A-24), and was then permitted to testify that the documents received in evidence over objection as to lack of foundation (A-22 - A-24) fairly indicated "that the shipment left our plant in Nashville, Tennessee, was picked up by Wings & Wheels, shipped by Wings & Wheels to their Newark dock, received at the Newark dock and later--but never arrived at the travel agent, apparently the tickets were missing, if I can use that word, after they were received in Newark by Wings & Wheels." (A-22; A-25).

Similarly, George Zackaroff, an employee of Wings & Wheels, Inc., was simply shown documents, expressed his familiarity with them (A-32), fairly indicated he had no personal knowledge of the documents and was not the custodian of them (A-33), but was permitted to read from the documents (A-33 - A-35) and testify to his own conclusions from such reading that "they [the documents] represent documented proof that we had picked up a piece of

freight . . . from Rand McNally and moved it through as being an air shipment [and] never arrived . . . . " (A-31 - A-33). Clearly, Mr. Zackaroff had absolutely no knowledge of the events described in the documents (A-33 - A-36) and was merely reading for emphasis those materials received in evidence over objection.

The identical procedure was followed in the examination of Frank Scinta, the investigator from the Air Traffic Conference, who was permitted to reiterate for the benefit of the jury the contents of those documents for which he offered no foundation (A-39) and was, as well, permitted to testify to the non-receipt of the tickets bottoming the two counts in the indictment, although the testimony was obviously hearsay. (A-41)

In virtually every instance an appropriate objection was voiced in respect of the hearsay nature of the evidence being proffered, including the absence of the requisite foundation for the documents. The rulings of the trial court reasonably indicate the absence of any reasonable exercise of judicial discretion in determining the objections:

> "THE COURT: This is a regular business report of yours, isn't it?" (A-20)
>
> * * *
>
> "MR. ROSNER: According to his

testimony the document is made out by Wings & Wheels. He works for Rand McNally. There couldn't be a foundation under the business records rule. He's not a custodian, has no knowledge of it.

"THE COURT: I'm certain Wings & Wheels is available." (A-21)

* * *

"MR. ROSNER: I don't think there's a proper foundation.

"THE COURT: Some of them require further foundation, but I'll receive them with further connection." (A-24 - A-25)

* * *

"Q Sir, did there come a time when you in your official capacity with the Air Transport Association learned that these tickets did not arrive at the Bayonne Travel Agency?

"A We received several phone calls from various airlines indicating--

"MR. ROSNER: Objection, unless the witness has personal knowledge. When he says 'We received,' is no indication--

"THE COURT: Sustained.

"MR. CUNNINGHAM: Might I have one moment.

"THE COURT: Yes.

(Pause)

"Q Do you know from your own knowledge as to whether or not these tickets arrived at the Bayonne Travel Agency?

"A I do.

"Q How did you find out these tickets did not arrive at the agency? What steps were taken when the tickets did not arrive?

"MR. ROSNER: Objection. Two questions here.

"THE COURT: Answer the second one first.

"THE WITNESS: Repeat it.

"Q What steps did you take in the normal course of events when you've been advised that tickets have not arrived at a travel agency?

"A We check with our office who controls the ticket requisitions, found out the signature copy of the ticket requisition, which is made by the travel agency had not been received. Then we contacted Rand McNally, found out the tickets had been shipped.

Then we contacted Wings & Wheels and found out that the tickets had been reported as missing." (A-40 - A-41)

* * *

"MR. ROSNER: Objection, move to strike all this testimony on the grounds it's all hearsay.

"THE COURT: I suppose we can bring in a bunch of witnesses to establish each step, but I'll overrule the objection." (A-42).

A careful examination of the testimonial evidence offered by the Government clearly indicates that the documents offered to establish the essential elements

of the crimes charged in the indictment,--theft, interstate shipment, possession of stolen goods, and knowledge of theft at the time of possession,--were received in evidence without adequate testimonial foundation, and the witnesses were permitted, even invited, to repeat the contents of those documents, and extrapolate on the contents, as if each witness had personal knowledge of the recitals in those documents.

Rule 602, Federal Rules of Evidence, provides, inter alia, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter", a provision subsequently amended in the Rules, supra at Rule 802, et seq., which simply excludes hearsay evidence. Rule 803(6) of the Rules, supra, excepts from that prohibition records "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make" the record. That exception is in accord with the statutory provision known as "The Federal Shopbook Entry Rule, 28 U.S.C. § 1732, the beneficent purpose of which has been observed to be "to avoid the necessity of producing the person who actually participated

in the transaction and then tracing through witnesses every step", United States v. Re, 336 F.2d 306, 314 (2d Cir. 1964), cert.den., 379 U.S. 904, the rationale underlying which is to "permit the admission of business memoranda which impart a circumstantial guarantee of trustworthiness. The test is one of reliability." United States v. Hickey, 360 F.2d 127, 143 (7th Cir. 1966).

To insure satisfaction of "[t]he test . . . of reliability", ibid., federal courts have adopted a simple yet clear formula for the foundation governing admissibility of such documents:

> "[A]ny writing or record, made as a memorandum of any act, transaction, occurrence or event, if made in the ordinary course of one's business and if it was the regular course of such business to make such record at the time or reasonably thereafter, is admissible as evidence of the act, transaction, occurrence or event." United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973)(Emphasis supplied).

That foundation must, as well, be laid by "someone who is sufficiently familiar with the business practice", ibid., and "it was insufficient to rely on one who had no direct knowledge of the business practice of the company which kept the records." J.Howard Smith, Inc. v. S.S. Maranon, 501 F.2d 1275, 1278 (2d Cir. 1974).

In this instance, a criminal prosecution where the litigant's liberty was at stake, the prosecution made no effort to obtain the testimony of the custodian of the

records and offered no preliminary testimony to establish that each declarant had familiarity with the business records of the company in whose employ he was. As well, there was not even the slightest effort to comply with the litany for laying the foundation for the records offered, viz., testimony that the record was made and kept in the ordinary course of business, that it was the ordinary course of business to make and keep such records, and that the records were made at or about the time of the event recorded. In fact, the trial court's response to objections as to this omission fairly conveyed its view that such objections were not appropriate, for it observed, inter alia, that "I suppose we can bring in a bunch of witnesses to establish each step, but I'll overrule the objection."* (A-42)

It is evident from the face of two crucial documents received in evidence against the Appellant that at least one salient requirement for satisfaction of the test of reliability was missing from those documents,--that the entry was made at or about the time of the event, act, transaction reflected in the record. The "Over - Short - Damage Report" of Wings & Wheels, Inc. is the only evidence of-

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* The trial court's attitude towards evidentiary objections can best be gleaned from a ruling on an objection made by counsel for the Appellant as to evidence of other criminal acts. In overruling the objection, the trial court observed, "I don't think your objection is made in good faith. * * * * You're trying to hoodwink the jury." (A-83 - A-84).

fered by the prosecution to establish the fact of theft, with one report being offered to establish the fact of theft for each count. (E-10, E-26). The first shipment of tickets from Rand McNally & Company, apparently destined for Greenwald Travel Service in Clifton, New Jersey, left Rand McNally & Company on about April 24, 1973, and were shipped by Allegheny Airlines on or about April 26, 1973. (E-11, E-12, E-14, E-24, E-25) The second chipment of tickets, apparently destined for Bayonne Travel Agency in Bayonne, New Jersey, left Rand McNally & Co. on May 23, 1973 and were shipped by Allegheny Airlines on the same date. (E-6 - E-9, E-15). The first shipment must therefore have arrived on or about April 26, 1973 and the second shipment must have arrived on or about May 23, 1973. On June 5, 1973, the "Over - Short - Damage Report" covering the first shipment was apparently completed, stating that "carton stolen from Wings & Wheels Newark dock morning of April 26, 1973" (E-26), and two days later, on June 7, 1973, the report covering the second shipment was apparently completed, stating "trucker notified Wings & Wheels office May 29, 1973 stating he could not locate [freight] for delivery". (E-10). In each instance, the report offered to establish the fact of theft was completed more than one week after the alleged event, by an unknown person, and the document,--with damning language of theft,--was received without any foundation whatsoever.

While the so-called "Over - Short - Damage Reports" (E-10, E-26) are the most egregious examples of the absence of adequate foundation for admissibility of documents,--since they go to the heart of the matter to be proved,--virtually all of the documents received in evidence to establish the essential elements of theft and the interstate character of the shipment lacked adequate evidentiary foundation. Thus, the trial was nothing more than an appeal from a government filing cabinet with the Appellant deprived of challenging in any way the evidence on which the Jury returned its verdict.

POINT II

THE EVIDENCE OF SUBSEQUENT CRIMINAL ACTS BY APPELLANT TO ESTABLISH KNOWLEDGE OF THE FACT OF THEFT SHOULD NOT HAVE BEEN RECEIVED.

As previously suggested, the sole evidence of theft and the interstate character of the shipments came from documents received in evidence without adequate foundation, while the Appellant's own testimony before the Grand Jury furnished sufficient direct and circumstantial evidence of possession of the goods. (A-117 - A-125). However, crucial to a conviction for the crimes charged in the indictment is proof that at the time of possession the Appellant "actually knew" that the tickets were stolen property. United States v. Fields, 466 F.2d 119, 120 (2d

Cir. 1972). Doubtless, as this Court has observed,

> "[i]t has long been held that 'Possession of fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession . . . ." United States v. Lefkowitz, 284 F.2d 310, 313 (2d Cir. 1960)(Emphasis supplied).

Here, assuming arguendo the admissibility of the "Short - Over - Damage Reports" (E-10, E-26) to establish the fact of theft, the thefts occurred on April 26, 1973 and May 25 - May 29, 1973 (see E-26 and E-10, respectively), and the proof of possession is the use of the tickets by two of Appellant's relatives on May 5, 1973 (E-1, E-2) and on June 25, 1973 (E-3 - E-5) by Steve Maltese. (A-117 - A-125). Perhaps fearful that the inference of knowledge from possession "of fruits of crime, recently after its commission", ibid., was attenuated or non-existent by the lapse of two weeks, the prosecution offered an eavesdropped telephone conversation to which Appellant was a party that occurred between one and one-half to three months after the possession of the tickets. (E-16 - E-23)(A-113, et seq.) Timely objection was made to the admissibility of that material where its sole relevance was on the issue of Appellant's knowledge of the fact of theft. (A-113 - A-114). Indeed, the trial court itself recognized that these subsequent criminal acts were offered solely for that purpose in observing that "I would suppose it's clearly admissible on

knowledge". (A-11[illegible] - A-114).* The eavesdropped conversation received in evidence established Appellant's subsequent participation in transactions involving airline tickets from the same source as those contained in the indictment.

Few decisions in this area have troubled to make the distinction between prior and subsequent criminal acts and between proof of such similar acts when the issue is knowledge, on the one hand, and when the issues are intent and motive, on the other hand. Appellant respectfully submits that where, as here, the sole issue is knowledge,--in this case, knowledge of the fact of theft of the goods possessed,--evidence of subsequent criminal acts should not have been received in evidence.

Perhaps the best explication of the rationale underlying the distinctions that the Appellant would have this Court draw is set forth in the opinion in Niederluecke v. United States, 21 F.2d 511 (8th Cir. 1927), a case in-

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* While the trial court included the issues of motive and intent as an apparent afterthought (A-114, lines 9-10), intent and motive are not relevant or essential elements of the two crimes contained in the indictment. As well, the two cases upon which the trial court relied in receiving the materials in evidence (A-113, lines 22-24) seemingly recognized the distinction which the Appellant seeks this Court to draw:

> "Proof of later similar acts . . . was admissible . . . in the trial court's discretion, for the limited purpose of showing his willful intent and motive." United States v. Diorio, 451 F.2d 21, 23 (2d Cir. 1972) (Per Curiam), cert.den., 405 U.S. 955 (Emphasis supplied)

volving violation of the National Motor Vehicle Theft Act (18 U.S.C. §408) on November 16, 1925. The prosecution offered evidence of possession of another stolen car on December 7, 1925,--two weeks subsequent to the possession charged in the indictment,--to establish that at the time of the possession bottoming the charge in the indictment the accused had the requisite knowledge. In reversing a judgment of conviction, the Court stated, inter alia, "the later offense, being later in time, had no possible causal effect upon the commission of the former". Id. at 513. But axiomatically, a subsequent similar criminal act may well be admissible to evidence the intent with which an accused engaged in a prior criminal act for which he is on trial as, for example, where an accused uses the mails on successive occasions for the purpose of executing a scheme to defraud,--where his intent to defraud is essential to the first mailing for which he is on trial. However, subsequent knowledge, as a matter of logic, cannot by any feat of legerdemain relate back to establish knowledge at the time of a prior possession of goods which were in fact stolen. As another Court noted,

> "knowledge is 'information as to a fact. The act of knowing; clear perception of the truth; firm belief; information.' While both intent and knowledge are recordations in the mental processes, intent is the 'design, resolve, or deter-

> mination' with which a person acts. While knowledge is concerned with a fact that has happened or occurred, it is information as to such fact. In other words, while one may have an intention to do something in the future, one cannot have knowledge of a fact at a certain time through some happening or occurrence that may take place in the future." Witters v. United States, 106 F.2d 837, 840(D.C.Cir. 1939).

See, also, Roe v. United States, 316 F.2d 617, 623-624 (5th Cir. 1963); Waller v. United States, 177 F.2d 171 (9th Cir. 1949).

Given the record herein, the sole purpose to which the evidence of subsequent similar criminal acts could have been put by the Jury on the charges contained in the indictment was to establish that it was more likely than not that the Appellant committed those crimes charged in the indictment, an impermissible use of that evidence of other criminal acts. See Rule 404(b), Federal Rules of Evidence; Roe v. United States, supra at 623.

CONCLUSION

The judgment appealed from should be reversed and the matter remanded to the District Court for a new trial.

Respectfully submitted,

JONATHAN L. ROSNER
Attorney for Appellant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SCOTT ALVINO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5701 15th AVE BROOKLYN, N.Y.

That on the 25th day of MARCH, 1976, deponent personally served the within BRIEF FOR APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

DAVID G. TRAGER, ESQ.
UNITED STATES ATTORNEY
ATTORNEY FOR APPELLE
U.S. COURTHOUSE
225 CADMAN PLAZA EAST
BROOKLYN, N.Y.

Scott Alvino

Sworn to before me this
25th day of March, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977